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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 713

JOE TENNER,
Petitioner,

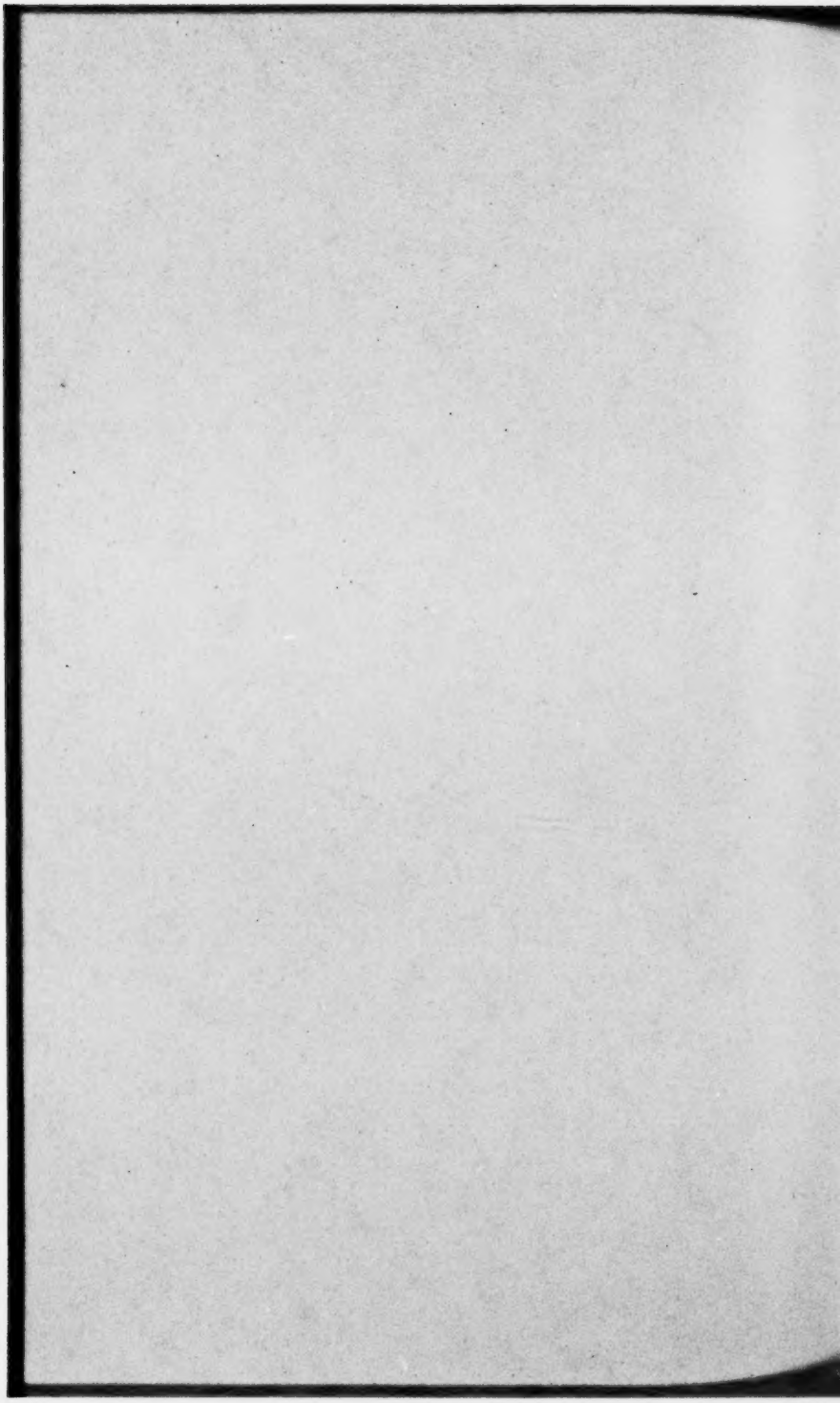
vs.

CHARLES W. DULLEA, Chief of Police of the City and County of San Francisco,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Superior Court of the State of California, in and for the City and County of San Francisco.

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PETITION FOR WRIT OF CERTIORARI

to the Superior Court of the State of California, in and for the City and County of San Francisco.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Joe Tenner for a Writ of Certiorari to the Superior Court of the State of California, in

and for the City and County of San Francisco, respectfully shows to Your Honors:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Your Petitioner, imprisoned by the respondent, Chief of Police of the City and County of San Francisco, State of California, sued out a Writ of Habeas Corpus in the Superior Court of the said City and County. The respondent made return to the Writ (Typewritten Transcript p. 9), setting forth that he held petitioner in custody on telegraphic instructions received from the Chief State Parole and Probation Officer for the State of Washington, it being alleged that petitioner had been convicted in the latter State and sentenced to a term of imprisonment in the penitentiary, that thereafter he had been granted parole, that said parole had been subsequently revoked by the Washington Board of Prison Terms and Paroles, and that petitioner was wanted in the State of Washington for violation of his parole from the Washington State Penitentiary.

Petitioner duly filed exceptions to the sufficiency of the return (Typewritten Transcript p. 12) upon the following grounds, among others:

"II.

That it appears on the face of the said return that the said Joe Tenner is not imprisoned or detained by virtue of any warrant, process, judgment, commitment or order of any Court of this State, or of the United States, or of any judge or judicial officer, or

of any executive officer of this State or of the United States.

III.

That it appears on the face of the said return that the said Joe Tenner is imprisoned and detained, and is restrained of his liberty upon the sole basis of telegraphic advices and instructions, and upon hearsay information received by the said Chief of Police.

IV.

That it does not appear from the said return that any demand or requisition for the arrest of the said Joe Tenner, or his delivery to any agent of the State of Washington, has been demanded or requested by the Governor, or other executive authority of Washington, of the Governor of the State of California, or that the Governor of the State of California has issued any warrant, or other process, for the arrest of the said Joe Tenner.

V.

That it does not appear from the said return that the said Joe Tenner has ever violated the terms of any parole imposed upon him in or by the State of Washington.

VI.

That no copy of any indictment found, or any affidavit charging the said Joe Tenner with any crime against the State of Washington, as provided by the Act of Congress (U. S. C. A., Title 18, Sec. 662) is set forth in said return.

VII.

That it appears on the face of said return that the said Joe Tenner is deprived of his liberty, and is imprisoned and restrained of his liberty in violation of Article 2, Section 2, Clause 2, of the Constitution of the United States.

VIII.

That it appears on the face of the said return that the said Joe Tenner, by virtue of the said imprisonment, is deprived of his liberty, without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States."

The matter was heard on the exceptions to the sufficiency to the return, and the Court, after argument, *without any written opinion,* made an order denying the writ. (Typewritten Transcript p. 15.) Under the Constitution of the State of California (Sec. 5, Article VI), Superior Courts have power to issue writs of habeas corpus on petition by, or on behalf of, any person in actual custody in their respective counties. In this they excercise concurrent jurisdiction with the Supreme Court and the District Courts of Appeal, and their judgments either granting or denying the writ are not appealable or subject to review by any other Court in any manner.

In re Hughes, 159 Cal. 360, 113 Pac. 684;
In re Zany, 164 Cal. 724, 130 Pac. 710;
In re Bruegger, 204 Cal. 169, 267 Pac. 101;
In re Cunha, 123 Cal. App. 625, 11 Pac. (2d) 902.

No pretense was made by the respondent that any extradition proceedings for the return of petitioner to the State of Washington had been instituted or that any attempt had been made to comply with the provisions of the Act of Congress (U. S. C. A., Title 18, Sec. 662), which prescribes the procedure necessary to secure the rendition of an alleged fugitive from justice. It was the contention of respondent that petitioner could be returned to the State of Washington as a parole violator without any extradition proceedings whatsoever by virtue of a certain compact between the State of Washington and the State of California authorized by an act of the California Legislature entitled "Uniform Act for Out-of-State Parolee Supervision" (Statutes 1937, p. 469, Deering's General Laws, 1937, Vol. II, p. 2732), the material portions of which are as follows:

> "(3) *Retaking probationers or parolees.* That duly accredited officers of a sending state may at all times enter a receiving State and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. *All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of States party hereto, as to such persons.* The decision of the sending State to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving State. If at the time when a State seeks to retake a probationer or parolee there should be pending against him within the receiving State any criminal charge, or he should

be suspected of having committed within such State a criminal offense, he shall not be retaken without the consent of the receiving State until discharged from prosecution or from imprisonment for such offense.

(4) *Transportation of persons retaken.* That the duly accredited officers of the sending State will be permitted to transport prisoners being retaken through any and all States parties to this compact, *without interference.*" (Italics ours.)

Section 2 of the Act recites that pursuant to the authority vested in the State by a certain act of Congress, the Governor is authorized and directed to enter into a compact or compacts on behalf of the State with any of the United States legally joining therein.

The Act of Congress relied upon (U. S. C. A., Title 18, Sec. 420) reads:

"The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts." (June 6, 1934, c. 406, Statute 909.)

It was the contention of petitioner that this Act of the State of California was invalid because repugnant to the provisions of Article II, Section 2, Clause 2, of the Constitution of the United States and to the due process of law clause of the 14th Amendment to the Constitution of the United States and to the

Act of Congress of 1793. (U. S. C. A., Title 18, Sec. 662.)

Thus the question to be determined by this honorable Court is whether a State by compact with another State can permit the latter's officers to come into its territory and arrest a person residing therein and remove him therefrom without compliance or attempted compliance, with the Federal constitutional and statutory provisions relative to interstate extradition, without abridging his privileges and immunities and without depriving him of his liberty without due process of law.

STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

A. The statutory provisions believed to sustain the jurisdiction are U. S. C. A., Title 18, Section 662; Section 237 of the Judicial Code; U. S. C. A., Title 28, Section 344, subdv. (b).

B. The date of the judgment of the State Court sought to be reviewed—October 17, 1941. This judgment, as previously shown, is final and not subject to review by appeal or otherwise by any other Court of the State of California.

C. That the nature of the cause of the rulings of the State Court were such as to bring the case within the jurisdictional provisions relied upon is sufficiently set forth in the preceding summary statement of the matter involved and from the certificate of the judge

of the State Court. (Typewritten Transcript p. 19.) As previously stated, the State Court denied the writ of habeas corpus without opinion, but the certificate sets forth that the validity of the statute of the State of California was drawn in question on the ground of its being repugnant to the Constitution and laws of the United States.

D. The cases believed to sustain the jurisdiction are in part as follows:

Prigg v. Pennsylvania, 16 Pet. 529, 10 Law. Ed. 1060;

Kentucky v. Dennison, 24 Howard 104, 16 Law. Ed. 728;

Mahon v. Justice, 127 U. S. 700, 32 Law. Ed. 283;

Lascelles v. Georgia, 148 U. S. 537, 37 Law. Ed. 549;

Hyatt v. New York, 188 U. S. 691, 47 Law. Ed. 657;

Innes v. Tobin, 240 U. S. 127, 60 Law. Ed. 562.

STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

1. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states."

Constitution of the United States, Article IV, Sect. 2.

Among these are:

"The right of a citizen of one state to pass through or *reside in any other state* for purposes of trade, agriculture, professional pursuits, or otherwise; *to claim the benefit of the Writ of Habeas Corpus;* etc."

Corfield v. Coryell (C. C. Pa.), 4 Wash. (U. S.) 271, 6 Fed., Cas. No. 3230;

Slaughter House Cases, 16 Wall. 97, 21 Law. Ed. 394.

2. In conformity with this constitutional provision, any person coming into a State has the right to remain there unless and until he is lawfully removed to another State on the demand of the executive authority thereof for a crime committed therein and from whose justice he has fled. The State cannot expel him. Banishment is not a punishment sanctioned by the law of this country.

"It is prohibited by public policy as tending to incite dissension among states, provoke retaliation and disturb that fundamental equality of political rights among the several states which is the basis of the Union."

People v. Baum, 251 Mich. 187, 231 N. W. 95, 70 A. L. R. 98.

3. It is well settled in a multitude of decisions, both State and Federal, *that the matter of interstate extradition is governed solely and exclusively by the Federal Constitution and laws.* It was intended by the provision of the Federal Constitution (Art. II, Sect. 2, Clause 2) to fully embrace the subject and

the provisions of the Act of 1793 are controlling, and exclusive of State power.

Innes v. Tobin, 240 U. S. 127, 60 Law. Ed. 562;
Kentucky v. Dennison, supra;
Lascelles v. Georgia, supra.

> *"No person can or should be extradited from one state to another unless the case falls within the constitutional provision, and the power which independent nations have to surrender criminals to another nation as a matter of favor or comity is not possessed by the states."*
>
> *People ex rel. Corkran v. Hyatt,* 172 N. Y. 176, 64 N. E. 825, 60 L. R. A. 774;
>
> *Affirmed in Hyatt v. New York,* 188 U. S. 691, 23 S. Ct. 456, 47 Law. Ed. 657.

The power of interstate extradition cannot be exercised by the chief executive of a State on the ground of comity or public policy. Not only the power but the matter of its exercise is based exclusively on the Constitution of the United States and the law of Congress passed in pursuance thereof.

Ex parte Morgan, 20 Fed. 298, 301.

The Act of 1793 provides:

> "Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime,

> certified as authentic by the Governor or Chief Magistrate of the state or territory from which the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, etc."

It is the rule, recognized without dissent in all of the decisions, that no person can be extradited from one State to another unless he be a fugitive from the justice of the demanding State, and that he be substantially charged with some crime known to the law in the demanding State, which is a question of law which is always open upon the face of the papers to judicial inquiry upon an application for discharge under a writ of habeas corpus.

Roberts v. Reilly, 116 U. S. 95.

It must be made to appear that the alleged fugitive was within the demanding State physically, and not constructively merely, at the time of the commission of the offense with which he stands charged.

Hyatt v. New York, supra;

State v. Hall, 115 N. C. 8, 20 S. E. 729, 28 L. R. A. 289;

In re Whittington, 34 Cal. App. 344, 167 Pac. 404.

Moreover, an alleged fugitive cannot be rendered up unless he be charged with a crime in the demanding State by an indictment which sufficiently charges a crime (*People ex rel. Lawrence v. Brady,* 56 N. Y. 182), or by an affidavit on oath certain and not on information or belief (*Ex parte Spears,* 88 Cal. 640,

26 Pac. 608), before an officer having the status of a magistrate. (*Ex parte Owen,* 10 Okl. Cr. 284, 136 Pac. 137.)

4. In view of the settled rule that an alleged fugitive can only be rendered up pursuant to the Constitution and laws of the United States, we submit that the compact between the States of California and Washington, which is the only law invoked by respondent as justification for holding petitioner, is unconstitutional and void. The statute permits an officer from one State to go into another and without any extradition proceedings whatsoever, without any demand of the executive authority of the sending State, without any warrant of the Governor of the aslyum State, and without any formalities other than the presentation of his own credentials, arrest any person alleged to be a parole violator and remove him to the sending State "without interference", which means, of course, without the right to appeal to the Courts of the State in which the prisoner resides and in deprivation of his right to invoke the writ of habeas corpus. We submit that if two States should enter into such a compact with reference to stray dogs, no Court would hold that a pound-master from one State could enter another State and take a dog out of the possession of one residing therein without according to the latter a judicial hearing. Is the right of a human being to his liberty of less moment than the right of property in an animal?

5. The rule that a parole violator is a fugitive from justice and therefore subject to extradition is a

false quantity. Even a violator of parole can only be extradited from one State to another by regular extradition proceedings, and this is recognized by the Supreme Court of the State of Washington.

State ex rel. Tresedor v. Remann, 4 Pac. (2d) 866, 78 A. L. R. 412.

6. Admittedly, neither this nor any other compact relative to parole violators, or, indeed, to any other subject, could be entered into without the consent of Congress.

Constitution of the United States, Art. I, Sect. 10, Clause 3.

The Act of Congress relied upon (Act of June 6, 1934, c. 406, Statute 909) and which is drawn in the most general and uncertain terms, *does not purport or pretend to authorize any State to surrender any person within its jurisdiction to another State by any proceedings other than legal extradition proceedings had in accordance with the Act of 1793.* We submit that the contentions of petitioner that the statute of the State of California in question is an illegal compact with another State which violates the provisions of Article II, Section 2, Clause 2, of the Constitution of the United States, and that the act is a deprivation of due process of law, are substantial Federal questions.

THE STAGE OF THE PROCEEDINGS AND THE MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED.

These matters are set forth with appropriate reference to, and quotations from the record, in the fore-

going summary statement of the matter involved, and restatement of the same is omitted in the interest of brevity.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The State Court has decided a Federal question of substance not heretofore specifically determined by this Court, in a manner not in accord with the applicable decisions of this Court for the reasons heretofore stated under the heading of the grounds upon which it is contended that the questions involved are substantial. Restatement of what we said under that heading is omitted in the interest of brevity.

The question is a novel one and is obviously a constitutional question of great importance for the reason that while more than half the States have entered into similar compacts, the constitutionality of the statute here challenged, and of like or similar statutes, has not been determined by this Court or by any other Court, State or Federal, in which any written opinion has been filed or which appears in any of the reports, either State or Federal.

The constitutionality of such legislation, involving as it does the power of the States to make compacts for the rendition of alleged violators of law other than in accordance with the Constitution of the United States (Article II, Section 2, Clause 2) and the act of Congress in aid thereof, ought, we submit, to be determined once and for all by this Court. Such legislation is in derogation of liberty, and should not be sustained.

In view of the contentions heretofore made and the authorities cited, we deem a supporting brief unnecessary to the consideration of this petition, and forbear its presentation in the interest of brevity.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the honorable judges of the Superior Court of the State of California, in and for the City and County of San Francisco, commanding them to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the cause entitled as above; and that the judgment of said Superior Court may be reviewed by Your Honors and the judgment thereof reversed; and that your petitioner have such other and further relief as to this Honorable Court shall seem meet, just and proper in the premises; and your petitioner will ever pray.

Dated, San Francisco, California,
October 22, 1941.

WILLIAM KLEIN,
WILLIAM F. HERRON,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am of counsel for the petitioner in the above entitled cause and that, in my judgment, the foregoing petition is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
October 22, 1941.

WILLIAM KLEIN,
Of Counsel for Petitioner.